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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Abdulbasit Abdullah,
Plaintiff,

v.

Social Security Administration
Commissioner,
Defendant.

No. CV-13-01811-PHX-DGC

ORDER

Plaintiff has filed a motion for attorney’s fees pursuant to the Equal Access to Justice Act (“EAJA”), 28 U.S.C. § 2412(d). The motion is fully briefed and no party has requested oral argument. The Court will grant Plaintiff’s motion.

I. Background.

Plaintiff applied for disability and supplemental security insurance benefits on March 5, 2010, alleging disability beginning January 1, 2007. Doc. 15 at 2. After a hearing on October 14, 2011, an administrative law judge (“ALJ”) issued an opinion on November 4, 2011, finding Plaintiff not disabled. A request for review was denied by the Appeals Council and the ALJ’s opinion became the Commissioner’s final decision on September 4, 2013. Doc. 15 at 2.

Plaintiff filed a complaint with this Court asking for review of the Commissioner’s decision. Doc. 1. On January 22, 2014, Plaintiff filed its opening brief, as well as a motion to supplement the record with additional evidence he had already submitted to the Appeals Council in 2012, including an assessment from Dr. Geary. Docs. 30 at 2; 14.

1 Defendant acknowledged that these records had not been addressed by the Appeals
2 Council and were relevant to the outcome of Plaintiff's case. Doc. 30 at 2-3. As a result,
3 Defendant filed a motion to remand on February 5, 2014. Doc. 16. Plaintiff opposed this
4 motion, arguing that remand was unnecessary and instead seeking a final decision that he
5 was entitled to benefits. Doc. 18. Because this Court found that there were several
6 outstanding issues requiring resolution before a determination of disability could be
7 made, the Court remanded the case for further proceedings. Doc. 20 at 3. Plaintiff now
8 seeks to recover costs and attorney's fees for legal work performed through the time
9 Plaintiff's counsel was able to confer with him and confirm in writing Defendant's offer
10 to remand. Doc. 29 at 5.

11 **II. Legal Standard.**

12 Under the EAJA, the Court must award attorney's fees to a prevailing party unless
13 the United States shows that its position was "substantially justified or that special
14 circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A); *see Gutierrez v.*
15 *Barnhart*, 274 F.3d 1255, 1258 (9th Cir.2001); *Flores v. Shalala*, 49 F.3d 562, 567 (9th
16 Cir.1995) ("The EAJA creates a presumption that fees will be awarded to prevailing
17 parties."). In this case, Plaintiff is a prevailing party because the final administrative
18 judgment denying his application for benefits was reversed and remanded for further
19 consideration. *Gutierrez*, 274 F.3d at 1257 ("An applicant for disability benefits becomes
20 a prevailing party for purposes of the EAJA if the denial of her benefits is reversed and
21 remanded regardless of whether disability benefits ultimately are awarded.").

22 **III. Was Defendant's Position Substantially Justified?**

23 Defendant argues that Plaintiff should be denied costs and attorney's fees because
24 the Commissioner's initial defense of this case, before seeking remand, was substantially
25 justified based on the information available to her at the time. Doc. 30 at 4. Defendant
26 also argues that Plaintiff did not act with reasonable diligence when he submitted the
27 records in question to the Appeals Council on May 21, 2012, a month after the deadline
28 set by the Appeals Council. *Id.* at 7-8.

1 The Supreme Court has held that a position may be substantially justified “if it has
2 a reasonable basis in fact and law.” *Pierce v. Underwood*, 487 U.S. 552, 566 n.2 (1988).
3 When determining whether the government’s position was substantially justified, the
4 Court considers “both the government’s litigation position and the underlying agency
5 action giving rise to the civil action.” *Meier v. Colvin*, 727 F.3d 867, 870 (9th Cir. 2013).

6 According to Defendant, “[w]ithin two weeks of the Plaintiff’s filing of evidence
7 showing that he had previously submitted Dr. Geary’s record to the Appeals Council, the
8 Commissioner filed a motion voluntarily seeking remand to address Dr. Geary’s
9 records.” *Id.* at 7. But Plaintiff brought to Defendant’s attention on December 30, 2013
10 the absence of Dr. Geary’s medical reports in the administrative record. Doc. 31-2.
11 Plaintiff asked Defendant to stipulate that he could supplement the record with these
12 documents. *Id.* Defendant indicated that it needed time to investigate the record and
13 confirm that it was incomplete. *Id.* Plaintiff sought an unopposed motion, at the
14 suggestion of Defendant, for an extension of time to file its opening brief while
15 Defendant was investigating. Doc. 12. The parties engaged in several weeks of email
16 correspondence concerning Plaintiff’s efforts to supplement the record. *Id.* at 1-7.
17 Noting that Defendant had not reached any conclusions about the status of the record or
18 provided any response to Plaintiff’s request to supplement, Plaintiff informed Defendant
19 that it would file the motion to supplement and the opening brief. Doc. 31-2 at 1. The
20 motion and brief were filed on January 22, 2014 (Docs. 14; 15), and Defendant
21 responded with a motion to remand, based on Dr. Geary’s unconsidered reports, on
22 February 5, 2014. Doc. 16. Thus, the question is whether Defendant’s continued
23 opposition to Plaintiff’s claim, despite being advised that the Appeals Council had failed
24 to consider relevant evidentiary reports, was substantially justified. The Court finds that
25 it was not.

26 Defendant was informed of the missing reports by Plaintiff in late December. It
27 provides no justification for continuing to oppose Plaintiff’s claim until February. Nor
28 does it provide any evidence that the Appeals Council was justified in its failure to

1 consider Dr. Geary's reports or its ultimate denial of Plaintiff's claim, as will be further
2 discussed below.

3 **IV. Did Special Circumstances Exist to Preclude an Award of Attorney's Fees?**

4 In the alternative, Defendant argues that Plaintiff's motion for costs and attorney's
5 fees should be denied under the special circumstances exception. This exception "gives
6 'the court discretion to deny awards where equitable considerations dictate an award
7 should not be made.'" *Scarborough v. Principi*, 541 U.S. 401, 423 (2004) (citing
8 H.R.Rep. No. 96-1418, p. 11 (1980)). Defendants contend that "Plaintiff's unexplained
9 month-late submission of Dr. Geary's records would make an award of attorney fees
10 under the EAJA unjust[.]" and would "reward counsel's lack of diligence and effectively
11 send the message that Social Security claimants' attorneys need not comply with agency
12 deadlines and instructions – and, in fact, may recover fees even where they create the
13 need for additional proceedings through their own failure to comply with agency
14 deadlines and instructions." Doc. 30 at 10, 11-12.

15 Defendant emphasizes that Plaintiff did not seek additional time to submit new
16 evidence or follow up to ensure that Dr. Geary's records were received by the
17 government. *Id.* at 9. But Plaintiff provides evidence that his counsel sought a 30-day
18 extension to submit supporting evidence to the Appeals Council. Doc. 31-1 at 2. In
19 accordance with this extension, several supporting medical documents were submitted on
20 May 21, 2012, including Dr. Geary's medical reports. While Dr. Geary's reports were
21 not considered by the Appeals Council, other documents submitted alongside them were
22 considered. Doc. 30 at 8. Therefore, Plaintiff's submittal of evidentiary reports after the
23 initial deadline does not appear to have affected the ability of the Appeals Council to
24 review and address that information.

25 The Court finds no evidence in the record indicating that the Appeals Council
26 found Plaintiff to have failed to exercise reasonable diligence in submitting these records.
27 Additionally, Defendant does not contend that Plaintiff did not exercise reasonable
28 diligence in informing the Commissioner of the Appeals Council's failure to consider Dr.

1 Geary's records or in seeking to supplement the record. Doc. 31-2 at 6. As discussed
2 above, Plaintiff first brought the absence of Dr. Geary's reports in the administrative
3 record to the attention of Defendant on December 30, 2013, asking Defendant to stipulate
4 that Plaintiff could supplement the record to include those documents. *Id.*

5 Defendant further contends that "Plaintiff and his attorney were arguably on notice
6 that the Appeals Council had not received Dr. Geary's records based on the conspicuous
7 absence of any mention of these records in the Appeals Council's denial of the request
8 for review, while the same notice explicitly addressed the other four PDF files that
9 Plaintiff had submitted." Doc. 30 at 9. Even accepting this alleged notice, it is unclear
10 how Plaintiff should have proceeded other than informing Defendant and filing for
11 review of the Appeals Council's decision, as he did. The fact that the absence was
12 "conspicuous" only supports Plaintiff's contention that the Commissioner's continued
13 opposition to Plaintiff's complaint until after Plaintiff filed his opening brief was not
14 substantially justified, as discussed above.

15 Finally, the Court is not convinced that an award of attorney's fees in this case
16 would encourage counsel to act without reasonable diligence in the future. Plaintiff's
17 counsel sought an extension to submit evidentiary reports, and there is no evidence that
18 the Appeals Council found Plaintiff to have acted without reasonable diligence.
19 Furthermore, Plaintiff's counsel made several efforts to bring the Appeals Council's
20 failure to the attention of Defendant and to reach an agreement concerning
21 supplementation of the administrative record. Policy considerations also favor
22 encouraging the government to cooperate with opposing parties and timely respond to
23 their requests. The Court cannot conclude that Defendant has met its burden to show
24 substantial justification or exceptional circumstances.

25 **V. Is the Amount of the Requested Fee Award Reasonable?**

26 Counsel submitted an itemized statement that shows he and his associate worked
27 18.3 hours on the case, plus one hour for a reply in support of the motion. Doc. 29-1 at 2.
28 Counsel also seeks \$418.93 in costs associated with filing fees and mailings. *Id.* Having

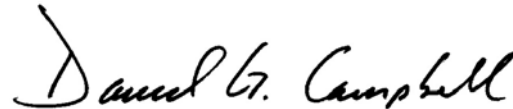
1 reviewed counsel's statement and having considered the fee award factors, *see Hensley v.*
2 *Eckerhart*, 461 U.S. 424, 429–30 (1983), the Court finds that the total of 19.3 hours is not
3 excessive. The Court will grant Plaintiff's motion and award \$3,664.04 in attorney's fees
4 and \$418.93 in costs.¹

5 **IT IS ORDERED:**

6 1. Plaintiff's motion for attorney's fees (Doc. 29) is **granted**.

7 2. Plaintiff is awarded **\$4,082.97** pursuant to the EAJA

8 Dated this 16th day of November, 2016.

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13 David G. Campbell
14 United States District Judge
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27 ¹ Plaintiff requests a cost of living increase for the billed hours in accordance with
28 rates set by the Ninth Circuit. *See* United States Courts for the Ninth Circuit Statutory
Maximum Rates Under the Equal Access to Justice Act, http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000039. These increases are granted.